



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov
DIV 11-04

STOLL, KEENON & PARK, LLP
300 W. VINE STREET, SUITE 2100
LEXINGTON KY 40507

COPY MAILED

NOV 30 2004

OFFICE OF PETITIONS

In re Application of :
James T. Hafendorfer :
Application No. 10/622,899 : DECISION DISMISSING
Filed: 19 July, 2003 : PETITION
Attorney Docket No. 101339.112335 :

This is a decision on the petition under 37 CFR 1.10(d) filed on 14 November, 2003, requesting that the above-identified application be accorded a filing date of 18 July, 2003, instead of the presently accorded filing date of 19 July, 2003.

The Office apologizes for the delay in responding to the present petition and regrets any inconvenience to petitioner.

Petitioners request the earlier filing date on the basis that the application was purportedly deposited in Express Mail service on 18 July, 2003, pursuant to the requirements of 37 CFR 1.10. In support, petitioners have provided a copy of an Express Mail log book purporting to show that the application was deposited on 18 July, 2003. Petitioners additionally assert that since the "time in" is marked 2:00 am on the Express Mail label showing a "date-in" of 19 July, 2003, the application must have been deposited with the USPS on 18 July, 2003.

Paragraph (a) of 37 CFR 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit

date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date.¹ (emphasis added)

At the outset, petitioners are reminded that correspondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the "Express Mail" mailing label with the "date-in" clearly marked. Persons dealing indirectly with the employees of the USPS (such as by deposit in an "Express Mail" drop box) do so at the risk of not receiving a copy of the "Express Mail" mailing label with the desired "date-in" clearly marked.² In this case, it is unclear from the facts presented whether the individual who deposited the application in Express Mail did so at a USPS customer service window or via a drop box. In any event, petitioners could have avoided the predicament that has now occurred by obtaining a copy of the Express Mail mailing label with the "date-in" completed before leaving the USPS customer service window. The Express Mail mailing label provides a means to verify the date that the application papers were deposited in Express Mail Post Office to Addressee Service.

Further, in this regard, petitioner's argument that the above-identified Express Mail shipment must have been deposited with the USPS on 18 July, 2003 because the Express Mail label shows it was received at 2:00 am on 19 July, 2003, has been considered but is not persuasive. In the absence of evidence that the application was actually accepted by the USPS on 18 July, 2003, it cannot be assumed that the application was deposited with the USPS on 18 July, 2003, or any date other than the "date-in" marked on the official Express Mail customer label, which is 19 July, 2003.

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as

¹See 37 CFR 1.6(a).

²37 CFR 1.10(b).

of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Any statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in § 10.1(r) of this chapter.

The petition lacks the showing required by item (3) above. The present petition is not supported by corroborating evidence showing that the correspondence was deposited as Express Mail prior to the last scheduled pickup on the requested filing date. Petitioner has not explained whether the log book entry was made after and within one day of the deposit of the application with the USPS. Petitioner would need to provide an affidavit or a declaration of facts by the individual who made the log book entry and deposited the application with the USPS stating the procedure for depositing Express Mail with the USPS and recording Express Mail mailings in the above-mentioned log.

Alternatively, petitioner should consider providing evidence from the USPS (e.g. Express Mail Corporate account Mailing Statement or an official letter) showing the date the application was accepted by the USPS.

In summary, the showing of record indicates that petitioners intended to deposit the application in Express Mail on 18 July, 2003, however there is no showing that the application was actually deposited in Express Mail Post Office to Addressee service on that date. Petitioners should also note that there is no provision in the rules for a certificate of mailing by

"Express Mail".³ In accordance with 37 CFR 1.10(d)(3), the Express Mail certificate of mailing may not serve as evidence of timely mailing because it was created prior to the deposit of the application in Express Mail.

Accordingly, the petition is dismissed.

The application is being referred to Technology Center 3700 for examination in due course.

Telephone inquiries may be directed to the undersigned at 571-272-3231.



Douglas Wood
Senior Petitions Attorney
Office of Petitions

³The requirement of 37 CFR 1.10(d) for a certificate of mailing by "Express Mail" has been waived by the Commissioner. See 1174 O.G. Pat. Of. 92 (May 16, 1995).